RECENT CASES

ADMIRALTY — EFFECT OF PAYMENT IN FULL BY AN ENEMY UNDERWRITER ON A PRIOR SEIZURE OF NEUTRAL GOODS. — Goods belonging to a neutral, but insured by German underwriters, were seized by Great Britain. The underwriters paid the owners in full as for a constructive total loss, and now claim the goods or proceeds in the name of the neutral shipper. *Held*, that the proceeds be condemned as enemy property. *The Palm Branch*, [1916] P. 230.

The original seizure was unjustifiable, for the goods were owned by a neutral. Yet the inevitable result of such seizure was the change to ownership by the belligerent underwriters. For the capture of goods insured against war risks is a *primâ facie* constructive total loss giving the owner the right to abandon. See *Peele* v. *Merchants Insurance Co.*, 3 Mason (U. S. C. C.) 27, 52, 65. See 6 EDW. 7, c. 41, § 60, sub-sec. 2 (Marine Insurance Act.) And the underwriter is liable whether the capture is lawful or unlawful. *Goss* v. *Withers*, 2 Burr. 683, 695. An abandonment by the owner has two results: the insurer is entitled to take over the interest of the assured in whatever may remain of the property, and the insurer is subrogated to all the rights and remedies of the assured as from the time of the casualty causing the loss. See *Stewart* v. *Greenock Ins. Co.*, 2 H. L. Cas. 159. See 6 EDW. 7, c. 41, § 79. Neither of these effects would seem to validate the original seizure. Subrogation in the present case should give the underwriters a perfect claim, although the court might well refuse to entertain their suit, *pendente bello*, because of their enemy citizenship. *Cf.* 28 HARV. L. REV. 312. And the underwriters' assumption of the shipper's title *because* of the capture could not retroactively justify the capture. Nor could a new seizure of goods or proceeds after the goods had been landed and sold be condoned in the face of the generally understood principle of international law that enemy goods in a belligerent country will not be confiscated. WESTLAKE, INTERNATIONAL LAW, Part II, 42. According to the rule in the present case, it would result that enemy-insured goods are as liable to confiscation as enemy-owned goods.

AGENCY — RESPONSIBILITY OF EMPLOYER FOR ASSAULT BY EMPLOYEE — RELATIONAL DUTY. — An employee of a corporation which held itself out to diagnose, treat and furnish appliances for defective feet and limbs, feloniously assaulted the plaintiff during the course of a private examination made after the corporation had agreed to take the plaintiff's case. The plaintiff sues the corporation. *Held*, that she may recover. *Stone* v. *Eisen Co.*, 219 N. Y. 205.

The theory of the plaintiff's complaint is tort. The court, however, granted a recovery on the basis of a breach of an implied term in the contract that the plaintiff shall be treated courteously. Undoubtedly, it is in accordance with the purposes of code procedure to allow a recovery if warranted on any theory of the facts. *Bruheim* v. *Stratton*, 145 Wis. 271; *Cockrell* v. *Henderson*, 81 Kan. 335, 105 Pac. 443; *Connor* v. *Philo*, 117 App. Div. 349, 102 N. Y. Supp. 427. But see *Barnes* v. *Quigley*, 59 N. Y. 265. But as a matter of substantive law the implication of such a term in the contract is pure fiction. The true basis of the decision must be found elsewhere. As the court seems to have recognized, it cannot be founded on pure agency doctrines. For acts which constitute an assault are, as a rule, outside the scope of a servant's employment and do not bind the master. *Hardeman* v. *Williams*, 150 Ala. 415, 43 So. 726. MECHEM, AGENCY, 2 ed., § 1977. But railroads, and according to some cases, innkeepers, themselves without fault, are held responsible for assaults by employees on passengers and guests. *Craker* v. *Chicago, etc. R.*, 36 Wis. 657; *Stewart* v. *Brooklyn, etc. R.*, 90 N. Y. 588; *Chicago, etc. R.* v. *Flexman*, 103 Ill. 546; *Goddard* v. *Grand Trunk Ry.*, 57 Me. 202; *Stanley* v. *Bircher's*

Ex'rs, 78 Mo. 245. See also *New Orleans, etc. R.* v. *Jopes*, 142 U. S. 18, 27. The employer's duty which is violated in these cases is one based on the existing relationship. *Delaware, etc. R.* v. *Trautwein*, 52 N. J. L. 169, 19 Atl. 178; *Chicago, etc. R.* v. *Flexman, supra*. See also *Gillespie* v. *Brooklyn Hts. R.*, 178 N. Y. 347, 352, 70 N. E. 857, 859; 28 HARV. L. REV. 620. The justification for imposing such an enlarged responsibility is found in the large degree to which the public in such situations surrender the care of their persons during periods of particular danger. *Hayne* v. *Union St. Ry.*, 189 Mass. 551. See also *Clancy* v. *Barker*, 71 Neb. 83, 92, 98 N. W. 440. The true basis of the decision in the principal case must be along the lines of the doctrine just laid down. If so, it is an extension into what the court recognizes as private business of a relational responsibility hitherto confined to public service enterprises. But see *Dickson* v. *Waldron*, 135 Ind. 507, 35 N. E. 1. If it is recognized that the true test for such extension is the degree of danger and bodily surrender in each situation, there is no reason why this should not be done. It becomes then a question of fact and policy rather than of law. Thus, see *Clancy* v. *Barker*, 71 Neb. 83, 101, 98 N. W. 440; *Clancy* v. *Barker*, 131 Fed. 161, 165, 166, 172; *Rahmel* v. *Lehndorff*, 142 Cal. 681, 76 Pac. 659.

CONFLICT OF LAWS — EFFECT AND PERFORMANCE OF CONTRACTS — APPLICATION OF FRENCH MORATORIUM TO A CONTRACT TO BE PERFORMED IN ANOTHER COUNTRY. — A bill of exchange was drawn and accepted in France, payable in New York. The holder sues on it in New York, after it is due according to its terms, but before it is due under the French moratorium. *Held*, that the bill is not due. *Taylor* v. *Kouchakji*, 56 N. Y. L. J. 813.

The authorities on what law governs the validity of a contract are in great confusion. Probably the most prevalent rule makes it depend on the intention of the parties. *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202. According to another line of cases the validity is governed by the law of the place of performance. *Douglass* v. *Paine*, 141 Mich. 485, 104 N. W. 781. Still a third rule makes it governed by the law of the place where the contract is made. *Carnegie* v. *Morrison*, 2 Met. (Mass.) 381. Theory as well as convenience would seem to support this last rule. See Joseph H. Beale, "What Law Governs the Validity of a Contract?" 23 HARV. L. REV. 1. For the same reasons, matters relating to performance should be governed by the law of the place of performance. *Abt* v. *American Trust Savings Bank*, 159 Ill. 467, 42 N. E. 856. *Contra*, *Jacobs* v. *Credit Lyonnais*, 12 Q. B. D. 589. So the sufficiency of the presentation and notice of dishonor of a negotiable instrument is to be determined by the law of the place where it is payable. *Hirschfeld* v. *Smith*, L. R. 1 C. P. 340; *Pierce* v. *Indseth*, 106 U. S. 546. *Contra, Amsinck* v. *Rogers*, 189 N. Y. 252, 82 N. E. 134. A moratorium does not affect the validity of any obligation. It simply says that the right to have payment on a certain date according to contract is a right to have payment only at a later date, according to law. It should therefore affect only such obligations as are to be performed in the jurisdiction which issues the moratorium. *Roquette* v. *Overman*, L. R. 10 Q. B. 525. If a moratorium is regarded merely as affecting the remedy, *i. e.*, if the time of payment, both by contract and law, is the date agreed upon, but action for a breach is delayed, the principal case is the more clearly wrong, as such a question must surely be determined by the law of the forum. *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 339. It seems pretty clear, however, that a moratorium affects the right of payment and not merely the remedy for a breach of such right.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — NON-RESIDENT HUSBAND BRINGING ACTION IN STATE ALLEGED TO BE SEPARATE RESIDENCE OF WIFE. — In an action for divorce brought by the husband the jurisdiction of